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No. 94-1316

IN THE
Supreme Court of the United States
OCTOBER TERM, 1994

SOUTHVIEW FARM and RICHARD H. POPP,
Petitioners,

v.

CONCERNED AREA RESIDENTS FOR THE ENVIRONMENT, *et al.*,
Respondents.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Second Circuit

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BRIEF OF AMICUS CURIAE EQUIPMENT MANUFACTURERS INSTITUTE IN SUPPORT OF PETITIONERS

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The Equipment Manufacturers Institute, *amicus curiae*, support the Petition for a Writ of Certiorari of Southview Farm and Richard H. Popp. All parties have consented to the filing of this brief, pursuant to Rule 37.3 of the Rules of this Court.

STATEMENT OF INTEREST

The Equipment Manufacturers Institute ("EMI") is the principal association in the United States representing manufacturers of farm, construction, forestry, ma-

terials handling, and utility equipment. EMI's concern is that the Second Circuit decision would impermissibly extend the Clean Water Act's permitting program for point sources to agricultural nonpoint sources. Contrary to clear Congressional intent, this unique decision would subject normal farming operations, and even tens of thousands of farm implements, to the cumbersome federal program.

SUMMARY OF ARGUMENT

In its decision below, the Second Circuit ruled directly contrary to Congressional intent and the settled expectations of farmers throughout the United States. Under the Clean Water Act, there is a clear distinction between point sources such as industrial and municipal discharges, which are subject to federal regulation, and nonpoint sources such as agricultural discharges, which are subject to state and local controls. Congress did not intend concentrated animal feeding operations, which are defined as point sources, to include dairy farms, such as Southview Farm, that grow feed crops as part of their operations.

Farm equipment and swales that do not directly discharge into navigable waters are not point sources subject to the permitting requirements of the Clean Water Act. Congress never intended them to be point sources, and over several decades governmental regulators and the agricultural community have never treated them as if they were point sources.

ARGUMENT

I. DAIRY FARMS GROWING FEED CROPS AS PART OF THEIR OPERATIONS ARE NOT CONCENTRATED ANIMAL FEEDING OPERATIONS UNDER THE CLEAN WATER ACT.

"Little Boy Blue come blow your horn,
The sheep's in the meadow, the cow's in the corn."

Even the characters in nursery rhymes know it is an agricultural calamity for sheep to get into the meadow or for cows to get into the corn. Yet the Second Circuit Court of Appeals, in a "city-slicker" decision reversing the District Court, would now require the cows to be kept in the crops in order that farmers retain their agricultural exemption under the Clean Water Act ("CWA").

From its beginning in 1972, the CWA has sharply distinguished between point sources and nonpoint sources. Point sources, namely industrial and municipal discharges, are subject to federal regulation, whereas nonpoint sources, principally agricultural discharges, are subject to state and local controls. *See* S. Rep. No. 370, 95th Cong., 1st Sess. at 8 (1977), *reprinted in* 1977 U.S.C.C.A.N. 4326, 4334. Industrial sources are typically concentrated, the "discernible, confined and discrete conveyance[s]" intended to be regulated as point sources. 33 U.S.C. § 1362(14) (1988). For point sources, federal discharge permits with specific effluent limitations are required. 33 U.S.C. § 1342 (1988). In contrast, agricultural sources are typically diffuse, and are considered nonpoint sources. For nonpoint sources, which include the diffuse and amorphous runoff from agricultural fields subject to the whims of nature, specific limits would be neither very practical nor very meaningful. Hence, most states do not require permits; instead, they establish good farming guidelines and practices designed to accomplish the same ends. 33 U.S.C. § 1329 (1988).

There is one exception: animal feedlots, which EPA terms "concentrated animal feeding operations" ("CAFOs"). 33 U.S.C. § 1362(14) (1988). These feedlots are special industrial-like facilities, which generally accept cattle from the farms in the surrounding region and fatten them for 60-120 days before they go to market. Feedlots typically have little or no land other than that used to hold livestock. These highly-concentrated operations can and do collect the resulting animal wastes for distribution as fertilizer elsewhere in the region or otherwise dispose of the waste. Although EPA regulations in 1975 set the lower limit for these facilities at a rather arbitrarily 700 mature dairy cattle or 1,000 slaughter and feeder cattle, feedlots typically contain thousands or tens of thousands of animals. There are also feedlots for swine and other animals, but the regulatory threshold numbers are different. *See* 40 C.F.R. § 122, App. B. Concentrated animal production where no crops are grown has long been recognized as more industrial than agricultural.

Under the regulations, farms having more than the threshold 700 dairy cattle are not automatically considered feedlots. They are designated as CAFOs only if they meet the following condition:

> Crops, vegetation forage growth, or post-harvest residues are not sustained in the normal growing season over any portion of the lot or facility.

40 C.F.R. § 122.23(b)(1)(ii) (1994).

Southview Farm is a modern farm of approximately 2200 acres, 1900 of which are used for growing crops or other purposes. It also maintains a herd of approximately 1290 milking cows, primarily housed in barns. As crops are grown on approximately 83 percent of the Southview Farm, the facility is obviously not a feedlot.

As an efficient farm, the dairy cows are fed crops grown on the farm, and their manure is used to replenish the fertility of the fields. That practice is in the best

environmental tradition of recycling natural products and using them as a substitute for chemical fertilizer. Under hazardous waste law, EPA has specifically exempted animal manures that are used as fertilizers from regulation as hazardous waste. 40 C.F.R. § 261.4(b)(2)(ii) (1994). This distinction can be critical. EPA distinguishes materials that are wastes, and subject to more stringent regulation from those that are recyclable materials or materials used as products, and subject to substantially more limited, if any, regulation. *Compare* 40 C.F.R. Part 264 (1994) (standards for owners and operators of hazardous waste treatment, storage, and disposal facilities) *with* 40 C.F.R. § 261.6(a)(3) (1994) (very limited requirements applicable to specified recyclable materials) and § 266.70 (1994) (limited requirements for recyclable materials used for precious metal recovery). Congress envisioned a similar distinction under the CWA. The manure is a valuable resource, best used as a fertilizer where it is needed.

The Second Circuit did not respect the distinction between dairy farms, where manure may be used on their own lands, and feedlots, where there is no other land and manure must be used as fertilizer off-site or otherwise disposed. The Circuit Court, without any statutory justification, decided the term "facility" applied only to the area where the dairy cattle were confined. That Court construed "facility", not in its normal sense as applying to the farm as a whole, but in such a narrow sense that a farm could have an infinite number of facilities. By thus arbitrarily dividing a farm into the dairy facility, the corn facility, the wheat facility, and any number of other such "facilities", any court might find that crops are not grown in the cattle facility. Since by this circular definition only dairy cattle were present in the cattle confinement area, no crops were grown in this sub-facility. This large, integrated farm was thus judicially transformed into a feedlot, subject to the jurisdiction of the CWA.

In order not to qualify as a CAFO under this strained interpretation, a farm would have either to raise cattle in the fields or to grow crops inside its barns. This is an absurd result, as anyone familiar with agriculture must realize, and it certainly cannot be what Congress intended. Courts may not so ignore a legislative judgment. *Middlesex County Sewerage Auth. v. National Sea Clammers Ass'n*, 453 U.S. 1, 18 (1981).

The Second Circuit has not only thwarted Congressional intent, but has also disrupted the long-standing understanding of federal and state environmental agencies and the agricultural community. If the Second Circuit has properly defined a CAFO, Southview Farm and virtually every other large farm in the country is now in violation of the CWA and has been for over twenty years. No one has thus far believed this to be the case. Neither EPA nor the Justice Department has yet demanded that large farms have federal or state discharge permits. Indeed, Southview Farm did not have a state CWA discharge permit. This was not an oversight because no one thought that a farm like Southview was within the scope of CAFOs. In fact, the State of New York specifically informed the farm that it was not required to have such a permit. An informal survey of other states indicates that environmental agencies generally have not requested large farms to obtain CWA permits, large farms have not applied for such permits, and few, if any, large farms have been subject to enforcement actions for failure to have a permit. The Second Circuit found little law on point, not because the District Court erred, but because no one imagined that an ordinary large dairy farm would ever be considered a CAFO.

The Circuit Court did claim to find one case "squarely on point," but that was a 1984 landlord-tenant eviction case involving a facility that was an acknowledged "finishing farm" for pigs. The status of the facility as a feedlot was not in question; it was a feedlot because it

was a feedlot. *Higbee v. Starr*, 598 F. Supp. 323 (E.D. Ark. 1984), *aff'd without opinion*, 782 F.2d 1048 (8th Cir. 1985). That circular argument is not relevant to whether the Southview Farm should be considered a CAFO here.

In 1987, when concern arose that the regulation of stormwater discharges might be applied not only to industrial but also to agricultural situations, Congress again amended the law to clarify, in the words of the legislative report, that "Agricultural Stormwater Discharges are not defined as a point source." 133 Cong. Rec. H131 (daily ed. Jan. 7, 1987) (analysis of Rep. Howard) on 33 U.S.C. § 1362(14), *reprinted in* 1987 U.S.C.C.A.N. 5 at 41. Field runoff is thus specifically excluded from federal discharge requirements.

Nevertheless, the Circuit Court has attempted in this case to graft a judicial exception onto the exemption, by claiming the manure applications were "excessive", contending that "there can be no escape from liability for agricultural pollution simply because it occurs on rainy days." *Concerned Residents for Environment v. Southview Farm*, 34 F.3d 114, 120 (2d Cir. 1994). Yet, whether the Circuit Court agrees with the wisdom of the agricultural stormwater exemption or not, Congress has explicitly determined that agricultural runoff is not subject to CWA permitting requirements. 33 U.S.C. § 1362(14) (1988).

The Circuit Court also creatively sought to narrow the exemption to apply only when the runoff is completely unsoiled by any contact with contaminants. Again, such conditions exist neither in the statute nor in the real world. Significantly, all cases cited to support this notion are either non-agricultural or date from before the passage of the 1987 congressional clarification.

II. FARM EQUIPMENT AND SWALES ARE NOT POINT SOURCES UNDER THE CLEAN WATER ACT.

The Second Circuit also disregarded Congressional intent by concluding that agricultural equipment and swales not directly discharging to navigable waters are point sources under the CWA. That Circuit attempted to undermine the basis of the agricultural exclusion by converting nonpoint agricultural discharges into point sources. Not only did Congress not intend this result, EPA has never acted as if this were true.

The Second Circuit interpretation would perhaps triple the scope of the CWA permitting program. It does this by deciding that swales and farm equipment such as manure spreaders are themselves point sources. Congress never authorized such a massive expansion of the federal water program, nor would it have done so without extensive debate and discussion. In a program operating since the 1970's, EPA and the states have issued approximately 65,000 CWA discharge permits, comprising perhaps 18,000 permits to municipal dischargers and 47,000 permits to industrial dischargers. There are approximately 370,000 large farms producing 76% of the food and fiber grown in the U.S. Under the Circuit Court's opinion, many of these farms would require a CWA discharge permit.

Under the Second Circuit opinion, even manure spreaders are point sources under the CWA. There are approximately 200,000 manure spreaders in the U.S., according to the best estimates of available data from the manufacturing trade association. Equipment Manufacturers Institute data reports. Yet, in more than twenty years of issuing CWA permits, EPA has never to our knowledge deemed it necessary to issue a single one to a manure spreader. Furthermore, under the Court's reasoning, agricultural equipment point sources cannot be limited to manure spreaders. Consequently, if a manure

spreader is a point source, presumably pesticide and fertilizer application equipment could also be point sources. We note that, based on annual sales figures and a ten-year life, there are approximately 105,000 pieces of pesticide equipment in the U.S. If only a small percentage of these pieces of farm equipment is subject to the requirements of the CWA, then the present permit program will be enormously expanded.

To add to the problem, the Circuit Court also invented a completely new category of point sources—swales. Swales are neither defined nor mentioned in the statute or the regulations. According to one state's conservation service, swales are depressions of unspecified size in the land that are at least seasonally wet, usually vegetated, and normally without flowing water. Personal communication, Virginia Department of Conservation and Recreation. On the apparent theory that if the water that occasionally pools in a swale does not happen to evaporate or seep into the ground, it might overflow into some ditch that might lead to some creek and then into navigable waters, the Circuit Court has discovered a new point source.

It is not clear how a permit could set specific discharge limits on such sources, how they would be monitored, or how they would be controlled. That is the very reason agriculture is considered a special case under the CWA and why nonpoint sources have always been regulated differently from point sources under the law. By that definition, there may be dozens, perhaps hundreds, of swales on any large farm. Without any guidance on the subject at all, it is difficult to imagine how EPA intends farmers to identify every swale on their land. Never before have swales been considered a point source.

The search for new point sources could be never-ending. In 1993, the Second Circuit decided that the human hand was not a point source, but it did so over the

dissent of the judge who wrote the opinion in the Circuit Court's present Southview Farm case. *U.S. v. Plaza Health Labs, Inc.*, 3 F.3d 643 (2d Cir. 1993), *cert. denied*, 114 S. Ct. 2764 (1994).

Legally, this strained attempt to discover new point sources is irrelevant. In 1987, Congress resolved a similar controversy by enacting the agricultural stormwater exemption. Runoff from farms is excluded from other provisions of the CWA, not merely because it is not a point source but, even if so, because it is specifically exempted.

Once before, in 1977, the Court of Appeals for the D.C. Circuit sought to expand the scope of the CWA by denying the agricultural exemption to irrigation return flows. *Natural Resources Defense Council, Inc. v. Costle*, 568 F.2d 1369 (D.C. Cir. 1977). The court contended that Congress mandated that the permit system be as inclusive as possible, even if that meant trimming back the agricultural exemption. Congress thought otherwise. It recognized the absurdity of requiring hundreds of thousands of permit applications for irrigation return flows, and within months clarified the CWA explicitly to exempt them. Clean Water Act of 1977, Pub. L. No. 95-217, 91 Stat. 1577 (codified as amended at 33 U.S.C. § 1362(14)). That congressional response should have been unnecessary, for the law was already very clear. It is no less clear in this case.

Congress certainly did not intend the CWA permit program, enacted with great fanfare after long debate in 1972 and in subsequent amendments, to be expanded so enormously without some mention or discussion. Nevertheless, the Second Circuit has intruded in an area where Congress has expressly forbidden. As petitioners for certiorari note, this is the kind of "judicial legislation under the guise of construction" that our system does not permit. *Blockburger v. U.S.*, 284 U.S. 299, 305 (1932).

CONCLUSION

For the reasons set forth above, EMI prays that a writ of certiorari be granted.

Respectfully submitted,

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